

# DLLR

STATE OF MARYLAND  
DEPARTMENT OF LABOR, LICENSING AND REGULATION

RRIS N. GLENDENING, Governor  
EUGENE A. CONTI, JR., Secretary

Board of Appeals  
Hazel A. Warnick, Chairperson

## - DECISION -

EMPLOYER:

America's Energy Savers Home  
Improvement, Inc.

DATE: November 26, 1996

DECISION #03579-BH-96

DETERMINATION #9452256

EMPLOYER ACCT.

Issue: The issue in this case is whether payments to certain individuals constitute covered employment or represent payments to independent contractors and are thereby excluded from unemployment insurance covered wages.

## - NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200*.

The period for filing an appeal expires: December 11, 1996

## - APPEARANCES -

FOR THE APPELLANT:  
Michael Marr, Attorney  
Timothy Munson

FOR THE SECRETARY:  
John T. McGucken, Legal Counsel

## EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.



## FINDINGS OF FACT

The Board of Appeals adopts the findings of fact of the Hearing Examiner.

## CONCLUSIONS OF LAW

Maryland Code Annotated, Labor and Employment Article, Section 8-201 provides that all compensation paid for personal services is considered covered employment unless exempted by law.

Maryland Code Annotated, Labor and Employment Article, Section 8-205 provides that work an individual performs under any contract is not covered employment if:

- 1) The individual who performs the work is free from control and direction over its performance both in fact and under the contract;
- 2) The individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work: and
- 3) The work is:
  - (i) outside the usual course of business of the person for whom work is performed; or
  - (ii) performed outside of any place of business of the person for whom work is performed.

In a case such as this the burden is on the employer to establish that all three prongs of section 8-205 have been met in order for individuals performing work to be exempted from covered employment. The employer has met that burden in this case.

The Board of Appeals adopts the Hearing Examiner's conclusions of law as to section 8-205 (1) and (3). Regarding section 8-205(1), the individuals performing the work are free from the control and direction of the employer over the performance of the work, both in fact and under the terms of the contract. The fact that the individuals performing the work had their licenses signed by this employer and are provided a pre-printed contract for customers to sign that is subject to the final approval of this employer, is insufficient to establish that the employer has such a degree of control and direction over how these individuals perform the work to make this work covered employment.

Regarding section 8-205(3), the individuals perform the work from their own homes and at the homes of potential customers. The amount of time spent by these individuals, at the workplace of the employer is but a small fraction of the time devoted to the performance of the work. The time spent at the workplace of the employer is minuscule and insufficient to make this work covered employment.

The Board of Appeals however does not adopt the Hearing Examiner's conclusions of law as to section 8-205(2). The Board concludes that the employer has met his burden of proof with regard to this prong of 8-205, also. Section 8-205 requires that the individual be customarily engaged in an independent business or occupation of the same nature as that involved in the work.

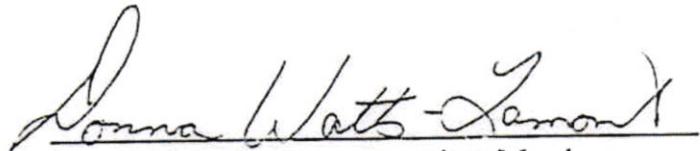
The facts of this case establish that the individuals are not precluded by this employer from engaging in any other type of employment. These individuals are free at all times to sell products and services for a competing company. The only restriction placed upon these individuals, as to how many competing companies they may work for, is provided pursuant to section 8-310 of the Business and Regulation Article. Section 8-310 provides that a salesperson may not represent more than two contractors at a time.

The Board of Appeals concludes that the requirements of section 8-205(2) were met by these individuals when they entered into the contract to perform this work for this employer. To find otherwise would be to find that the Maryland Legislature meant to require anyone wishing to work as an independent salesperson to set up an independent business, before they could enter into a contract of the nature found in this case. The Board of Appeals does not find any evidence that that was the intent of the Legislature in creating this law. To find such a requirement in the law would be to place an undue burden and hardship on individuals attempting to enter the workplace as independent salespersons.

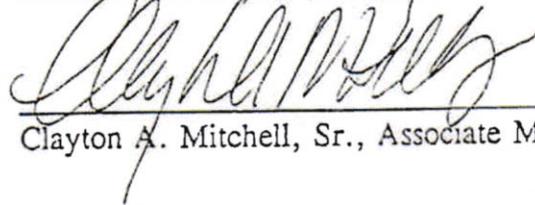
#### DECISION

America's Energy Savers Home Improvements, Inc. has satisfied the statutory requirements of section 8-205 of the Labor and Employment Article regarding services performed by the salespersons listed in the Agency's audit report for the 1991 and 1992 calendar years. These individual's earnings were not covered employment and this employer shall not be required to report such wages for Maryland Unemployment Insurance purposes.

The decision of the Hearing Examiner and Agency determination No. 9452256 is reversed.



Donna Watts-Lamont, Associate Member



Clayton A. Mitchell, Sr., Associate Member

KJK

Copies mailed on November 6, 1996 to:

America's Energy Savers Home

Jerry Placek, Room 407

FILE

# DLLR

STATE OF MARYLAND  
DEPARTMENT OF LABOR, LICENSING AND REGULATION

PARRIS N. GLENDENING, Governor  
EUGENE A. CONTI, JR., Secretary

Board of Appeals  
Hazel A. Warnick, Chairperson

## - CORRECTED DECISION -

EMPLOYER: DATE: December 10, 1996  
America's Energy Savers Home DECISION #03579-BH-96  
Improvement. Inc. DETERMINATION #9452256  
EMPLOYER ACCT.

Issue: The issue in this case is whether payments to certain individuals constitute covered employment or represent payments to independent contractors and are thereby excluded from unemployment insurance covered wages.

## - NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200*.

The period for filing an appeal expires: January 9, 1997

## - APPEARANCES -

FOR THE APPELLANT:  
Michael Marr, Attorney  
Timothy Munson

FOR THE SECRETARY:  
John T. McGucken, Legal Counsel

## EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.



### FINDINGS OF FACT

The Board of Appeals adopts the findings of fact of the Hearing Examiner.

### CONCLUSIONS OF LAW

Maryland Code Annotated, Labor and Employment Article, Section 8-201 provides that all compensation paid for personal services is considered covered employment unless exempted by law.

Maryland Code Annotated, Labor and Employment Article, Section 8-205 provides that work an individual performs under any contract is not covered employment if:

- 1) The individual who performs the work is free from control and direction over its performance both in fact and under the contract;
- 2) The individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work: and
- 3) The work is:
  - (i) outside the usual course of business of the person for whom work is performed; or
  - (ii) performed outside of any place of business of the person for whom work is performed.

In a case such as this the burden is on the employer to establish that all three prongs of section 8-205 have been met in order for individuals performing work to be exempted from covered employment. The employer has met that burden in this case.

The Board of Appeals adopts the Hearing Examiner's conclusions of law as to section 8-205 (1) and (3). Regarding section 8-205(1), the individuals performing the work are free from the control and direction of the employer over the performance of the work, both in fact and under the terms of the contract. The fact that the individuals performing the work had their licenses signed by this employer and are provided a pre-printed contract for customers to sign that is subject to the final approval of this employer, is insufficient to establish that the employer has such a degree of control and direction over how these individuals perform the work to make this work covered employment.

Regarding section 8-205(3), the individuals perform the work from their own homes and at the homes of potential customers. The amount of time spent by these individuals, at the workplace of the employer is but a small fraction of the time devoted to the performance of the work. The time spent at the workplace of the employer is minuscule and insufficient to make this work covered employment.

The Board of Appeals however does not adopt the Hearing Examiner's conclusions of law as to section 8-205(2). The Board concludes that the employer has met his burden of proof with regard to this prong of 8-205, also. Section 8-205 requires that the individual be customarily engaged in an independent business or occupation of the same nature as that involved in the work.

112

The facts of this case establish that the individuals are not precluded by this employer from engaging in any other type of employment. These individuals are free at all times to sell products and services for a competing company. The only restriction placed upon these individuals, as to how many competing companies they may work for, is provided pursuant to section 8-310 of the Business and Regulation Article. Section 8-310 provides that a salesperson may not represent more than two contractors at a time.

The Board of Appeals concludes that the requirements of section 8-205(2) were met by these individuals when they entered into the contract to perform this work for this employer. To find otherwise would be to find that the Maryland Legislature meant to require anyone wishing to work as an independent salesperson to set up an independent business, before they could enter into a contract of the nature found in this case. The Board of Appeals does not find any evidence that that was the intent of the Legislature in creating this law. To find such a requirement in the law would be to place an undue burden and hardship on individuals attempting to enter the workplace as independent salespersons.

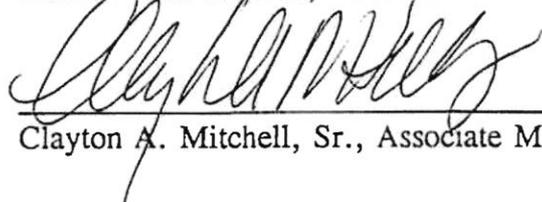
#### DECISION

America's Energy Savers Home Improvements, Inc. has satisfied the statutory requirements of section 8-205 of the Labor and Employment Article regarding services performed by the salespersons listed in the Agency's audit report for the 1991 and 1992 calendar years. These individual's earnings were not covered employment and this employer shall not be required to report such wages for Maryland Unemployment Insurance purposes.

The decision of the Hearing Examiner and Agency determination No. 9452256 is reversed.



Donna Watts-Lamont, Associate Member



Clayton A. Mitchell, Sr., Associate Member

KJK

Copies mailed on November 6, 1996 to:

America's Energy Savers Home

Jerry Placek, Room 407

FILE

15

**UNEMPLOYMENT INSURANCE--APPEALS DIVISION**  
**EMPLOYER APPEAL**  
**DECISION**

IN THE MATTER OF THE APPEAL OF:

America's Energy Savers Home

EMPLOYER ACCOUNT NUMBER

DETERMINATION NUMBER                      9452256

BEFORE THE:

Department of Economic  
and Employment Development  
Appeals Division  
1100 North Eutaw Street  
Room 511  
Baltimore, MD 21201  
(410) 767-2421

March 10, 1995

FOR THE APPELLANT: Michael Marr, Esquire; Timothy Munson - President and Barry Quirk - A Former Salesperson

FOR THE SECRETARY: Jerry Placek - Review Determination Unit Supervisor

**ISSUE(S)**

The issue in this case is whether payments to certain individuals constitute covered employment or represent payments to independent contractors and are thereby excluded from unemployment insurance covered wages.

**FINDINGS OF FACT**

The employer filed a timely appeal to an Agency's determination which held that 74 salespersons listed in an Agency audit of the 1991 calendar year and 154 salespersons listed in an Agency audit of 1992 calendar year were employees of America's Energy Savers Home Improvement, Inc. and not independent contractors within the meaning of the Law.

The employer is a Maryland corporation licensed as a contractor by the Maryland Home Improvement Commission (MHIC) to do home improvements, consisting of the sales and installation of windows, doors, siding, roofing and remodeling. The employer engages salespersons to sell the home improvements and sub-contractors to do the construction work. The salespersons have an oral agreement with the employer that they would be paid a fifteen percent commission for sales made to customers for the work to be done by the employer. The salespersons have the option of finding their own sales leads or using sales leads provided by the employer's Telemarketing Department. If a salesperson uses sales leads from the employer's Telemarketing Department the commission paid on any sales made from those leads is reduced to ten percent of the sale payable. Once a salesperson obtains a customer who wants to make a purchase they have that customer sign a pre-printed contract

and give that contract to the employer for further processing. The salesperson's sale of home improvements to home owners is subject to the final approval of the employer. The customer pays the employer who then pays the commission to the salesperson. The salespersons are told by the employer that they are being treated as independent contractors and are responsible for paying their own taxes as such. Approximately seventy-five percent of a salesperson's time is spent in searching for sales, by making phone calls from the salesperson's home to potential customers or by knocking on homeowners' doors. Approximately twenty-four percent of a salesperson's time is spent at a homeowner's home filling out the contract of sale, and obtaining the signature thereon. Approximately one percent of the salesperson's time is spent in the employer's office. The salespersons have no fixed work hours and are free to perform their work as they see fit. The only equipment the employer provides to the salesperson is a pre-printed contract form to be signed by the homeowners. The salespersons are not prohibited by the employer from working elsewhere while providing sales services to the employer.

The salesperson by law must be licensed by the MHIC to sell home improvements. The salespersons obtained this license by taking and passing an examination and then making an application. In order to sell home improvement the salespersons must secure a contractor's signature on the application for the salesperson and may not represent more than two contractors at a time. The employer signed all of the salespersons' MHIC license applications. Some of the salespersons were engaged in other forms of employment while performing salespersons' services for this employer. The evidence failed to show that any of the salespersons were acting as salespersons for another contractor while performing salespersons' services for this employer.

### CONCLUSIONS OF LAW

Maryland Code Annotated, Labor and Employment, Section 8-201 (1991) provides that all compensation paid for personal services is considered covered employment unless exempted by Law.

Maryland Code Annotated, Labor and Employment, Section 8-205 (1991) provides that work an individual performs under any contract of hire is not covered employment if:

- (1) The individual who performs the work is free from control and direction over its performance both in fact and under the contract;
- (2) The individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and
- (3) The work is:
  - (i) outside of the usual course of business of the person for whom work is performed; or
  - (ii) performed outside of any place of business of the person for whom work is performed.

Maryland Code Annotated, Business Regulations, Section 8-306 provides that a salesperson's license may not be issued unless the Commission has received from a licensed contractor written notice signed by both the licensed contractor and salesperson, of an employment or other contractual relationship between the licensed contractor and salesperson.

Maryland Code Annotated, Business and Regulations, Section 8-310 provides that a salesperson may not represent more than two contractors at a time.

### EVALUATION OF THE EVIDENCE

The Agency's 1991 calendar year audit disclosed that payments were made to 74 different salespersons, and the Agency's 1992 calendar year audit disclosed that payments were made to 154 salespersons. Pursuant to Section 8-201 those payments are considered to be covered employment and reportable wages under the Unemployment Insurance Law unless there is a specific exclusion under the Law. The burden of proof then shifts to the employer to show that these wages were excludable under a provision of the Law.

The employer is claiming that the wages paid to these salespersons are excluded pursuant to the independent contractor tests as provided by Section 8-205 of the Law. In order for that Section of the Law to exclude covered employment, all three of the test set forth must be met. Failure to meet any one of those three tests results in a failure of the individual to be an independent contractor within the meaning of the Law.

While the employer's signature is required in order to obtain the salesperson's license, and the employer does have the final approval of the contracts submitted by the salespersons, the salespersons perform their work during the hours they select in the method they see fit free from any direction and control from the employer. Therefore, it is determined that the salespersons meet the requirements of Section 8-205(i).

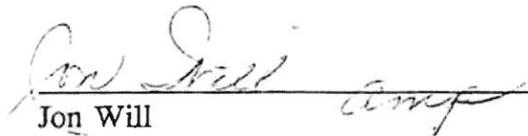
The fact that the salespersons are free to work for other employers, and that some of the salespersons did work for other employers of an unknown nature, is insufficient, in and of itself, to show that the salespersons were engaged in an independent business or occupation of the same nature as the employer. Additionally, the limitations provided by the Business Regulations Article are dispositive of the fact that a salesperson is legally constrained from being independent. Since the employer has failed to show the salespersons meet the criteria of Section 8-205(2), it must be held that the salespersons are not independent contractors within the meaning of the Maryland Unemployment Insurance Law.

The services provided by the salesperson is in the usual course of business of this employer. However, the majority of the work, trying to obtain sales, is performed outside of any place of business of this employer which means the salespersons do meet the requirements of Section 8-205(3).

## DECISION

America's Energy Savers Home Improvement, Inc. has not satisfied the Statutory requirements of Section 8-205 of the Labor and Employment Article regarding services performed by the salespersons listed in the Agency's audit report for the 1991 and 1992 calendar years. These individual's earnings were covered employment and this employer would have been required to report such wages for Maryland Unemployment Insurance purposes.

Therefore, the Agency's determination No. 9452256 is affirmed.

  
Jon Will  
Special Examiner

### Notice of Right to Petition for Review

Any party may request a review either in person or by mail which may be filed in any local office of the Department of Economic and Employment Development, or with the Board of Appeals, Room 515, 1100 North Eutaw Street, Baltimore, MD 21201. Your appeal must be filed by March 27, 1995.

Note: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Copies mailed on March 10, 1995 to:

America's Energy Savers Home

Michael Marr - 5407 St. Albans Way, Baltimore, MD 21212

Jerry Placek, Room 407

FILE



following directions:

*the enrollment  
of 113*

1. The Board must hear this appeal on remand within thirty days of the date of this Order,
2. The full three member Board of Appeals must participate in the hearing which will be *de novo*.
3. The Board must issue its written decision in this case within <sup>30 days</sup> ~~15~~ days of the date of the scheduled hearing on remand.
4. In its decision on remand, the Board must set forth, explicitly, its findings of fact relating to and the grounds for its decision regarding America's Energy Savers' coverage or exemption from coverage for unemployment taxes for each prong of the three part, conjunctive test set forth in Maryland Annotated Code, Labor and Employment Article, Section 8-205.

JOHN CARROLL BYRNES

JUDGE

THE JUDGES SIGNATURE

APPEARS ON THE ORIGINAL

DOCUMENTS ONLY.

JUDGE